UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE ORTIZ,

Plaintiff,

-against-

BREADROLL, LLC d/b/a MAISON KAYSER,

Defendants.

ECF Case

Index No. 16-cv-7998-KBF

ANSWER & COUNTERCLAIM COMPLAINT

Defendants BREADROLL, LLC d/b/a MAISON KAYSER ("Defendant") as and for its Answer to the Complaint filed by Plaintiff JOSE ORTIZ, states and alleges as follows:

JURISDICTION AND VENUE

1. States that the allegations in Paragraph 1 of the Complaint constitute legal conclusions to which no response is required. To the extent that any response is required, Defendant denies the allegations, except admits that the Court has federal question jurisdiction over Plaintiff's FLSA claims.

2. States that the allegations in Paragraph 2 of the Complaint constitute legal conclusions to which no response is required. To the extent that any response is required, Defendant denies the allegations, except admits that Defendant conducts business in this District.

PARTIES

3. Denies the allegations in Paragraph 3 of the Complaint, except admits that Defendant is a New York corporation.

4. Admits the allegations in Paragraph 4 of the Complaint.

FACTS

5. Denies the allegations in Paragraph 5 of the Complaint.

6. Denies the allegations in Paragraph 6 of the Complaint.

7. Denies the allegations in Paragraph 7 of the Complaint.

8. Denies the allegations in Paragraph 8 of the Complaint.

9. Denies the allegations in Paragraph 9 of the Complaint.

10. Denies the allegations in Paragraph 10 of the Complaint.

11. Admits the allegations in Paragraph 11 of the Complaint.

12. Admits the allegations in Paragraph 12 of the Complaint.

13. Denies the allegations in Paragraph 13 of the Complaint.

14. Denies the allegations in Paragraph 14 of the Complaint.

FIRST CLAIM OF RELIEF
(FLSA Overtime Violations, 29 U.S.C. § 201 *et seq.*)

15. Reallege and incorporate their responses to all previous allegations contained in the Complaint.

16. Denies the allegations in Paragraph 16 of the Complaint.

17. Denies the allegations in Paragraph 17 of the Complaint.

18. Denies the allegations in Paragraph 18 of the Complaint.

19. Denies the allegations in Paragraph 19 of the Complaint, and specifically denies that any relief is due and/or owing.

SECOND CLAIM OF RELIEF
**(NY States Overtime Violations, N.Y. Lab. L. §§ 650 *et seq.*,
N.Y. Comp. Codes R. & Regs., tit. 12 § 146-1.4)**

20. Reallege and incorporate their responses to all previous allegations contained in the Complaint.

21. Denies the allegations in Paragraph 21 of the Complaint.

22. Denies the allegations in Paragraph 22 of the Complaint.

23. Denies the allegations in Paragraph 23 of the Complaint, and specifically denies

that any relief is due and/or owing.

THIRD CLAIM OF RELIEF
(New York Notice Requirements, N.Y. Lab. L. § 195, 198)

24. Reallege and incorporate their responses to all previous allegations contained in the Complaint.

25. Denies the allegations in Paragraph 25 of the Complaint.

26. Denies the allegations in Paragraph 26 of the Complaint, and specifically denies that any relief is due and/or owing.

PRAYER FOR RELIEF

27. Denies that Plaintiff is entitled to any of the relief requested in the Prayer of Relief paragraph of the Complaint, including subparts (A) through (F), or to any relief at all, against Defendants.

DEFENSES

Defendant asserts the following defenses and/or affirmative defenses, without assuming any burden of proof that otherwise does not exist as a matter of law.

1. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted, including, but not limited to, a claim upon which prejudgment interest may be granted.

2. The claims of Plaintiff, in whole or in part, by the doctrine of accord and satisfaction, waiver, laches, estoppel, comparative fault, contributory fault, and/or the applicable statute of limitations.

3. Defendant's actions were not willful. No act or omission of Defendant that is alleged to violate the law was willful, knowing, or in reckless disregard for the provisions of the NYLL and/or FLSA.

4. Plaintiff's claims are barred, in whole or in part, because Defendant at all times

acted in good faith to comply with the NYLL and/or FLSA, and had reasonable grounds for believing they were in compliance with the NYLL and/or FLSA. Defendant asserts a lack of willfulness or intent to violate the NYLL and/or FLSA as a defense to any claim for liquidated damages.

5. Any actions that Defendant took in connection with Plaintiff were done in good faith, in conformity with and reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the United States Department of Labor and/or New York Department of Labor.

6. Plaintiff's claims are barred to the extent he failed, refused, and/or neglected to mitigate or avoid the damages complained of in the Complaint, if any.

7. If Plaintiff succeeds in establishing any violation under the FLSA and/or NYLL, and to the extent any sums are found due and owing, Defendant is entitled to a set-off against said sum to the extent paid, tendered, waived, compromised, and/or released prior to the adjudication herein, including but not limited to those amounts paid, tendered, waived, compromised, and/or released through any other proceeding, either formal or informal, or to the extent any additional compensation was paid to Plaintiff over and above their wages and/or beyond the time period compensable under the NYLL and/or FLSA, including, but not limited to, additional amounts paid as per the allegations in the Counterclaim Complaint.

8. Plaintiff's claims are barred or should be reduced, in whole or in part, by exclusions, exceptions, credits, recoupments, or offsets permissible under the FLSA and/or NYLL.

9. Even if Defendant has, in fact, failed to pay Plaintiff for any of the activities alleged in the Complaint (which it has not), such activities were preliminary or postliminary to principal activities and/or do not constitute compensable work under the FLSA or NYLL, and,

furthermore, such activities were not an integral and indispensable part of the principal activities of employment and are not compensable.

10. Plaintiff's FLSA claims pertaining to alleged unpaid work time for non-overtime hours fails in any workweek in which their total compensation for the week exceeds the minimum wage for all non-overtime hours worked that week.

11. Plaintiff's claims are barred, in whole or in part, because, to the extent any violations are established, they constitute *de minimis* violations.

12. At all times, Defendant made complete and timely payments of all wages due to Plaintiff under Article 6 or Article 19 or Article 19-A of the NYLL or under the FLSA.

13. At all times, Defendant reasonably believed in good faith that it provided Plaintiff with adequate notice of wage information pursuant to New York Labor Law § 195.

14. To the extent discovery reveals that Plaintiff falsely reported his hours when he was a non-exempt employee, and there is no evidence that Defendant knew or should have known that he was providing false information regarding his hours, Defendant hereby invokes the doctrine of estoppel to bar Plaintiff's claims.

15. The Court should not exercise supplemental jurisdiction over the counts in the Complaint that purport to arise under the NYLL.

16. In addition to the foregoing defenses, Defendant reserves the right to amend its Answer to the Complaint to raise any and all additional affirmative and other defenses that may become evident during discovery and during any other proceeding in this action or to pursue any additional counterclaims against Plaintiff as those claims become known during this litigation.

WHEREFORE, Defendant requests judgment against Plaintiff with respect to his claims asserted herein, dismissing the Complaint in this action, and entering judgment in favor of Defendant, together with costs and disbursements of the above-entitled action and any other relief this Court may deem just and proper.

DEFENDANT'S COUNTERCLAIMS

For its counterclaims against Plaintiff/Counterclaim-Defendant Jose Ortiz ("Ortiz"), Defendant/Counterclaim-Plaintiff Breadroll, LLC d/b/a Maison Kayser ("Maison Kayser"), by and through its undersigned attorneys, Littler Mendelson, P.C., alleges as follows:

JURISDICTION

1. This Court has jurisdiction over these counterclaims pursuant to its supplemental jurisdiction under 28 U.S.C. § 1367 and Fed. R. Civ. P. 13.

PARTIES

2. Defendant/Counterclaim-Plaintiff Breadroll, LLC d/b/a Maison Kayser ("Maison Kayser"), is a New York corporation with corporate offices in New York County, New York.

3. Upon information and belief, Plaintiff/Counterclaim-Defendant Jose Ortiz is a resident of New York, currently residing in Bronx County, New York.

STATEMENT OF FACTS

4. Maison Kayser employed Ortiz from November 22, 2013 to May 21, 2016.

5. In or around June 2014, Maison Kayser promoted Ortiz.

6. As a result of his promotion, Maison Kayser issued Ortiz a Visa credit/debit card, to be used *only* for Maison Kayser-related business purposes.

7. While the credit card was issued in Ortiz's name, Maison Kayser was liable on the account for any and all charges.

8. For every purchase made on the credit card, Maison Kayser required Ortiz to submit the receipt.

9. In addition, every month, Maison Kayser required Ortiz to submit a Maintenance Debit Card Report with respect the charges.

10. The Maintenance Debit Card Report required Ortiz to confirm the amount charged, check off the type of expense, and write in the following information: job location, department, transaction date, description, and total.

11. Ortiz, however, did not always submit receipts or his Maintenance Debit Card Reports on a timely basis (or submit receipts at all).

12. In January 2016, for example, the finance department reached out to Ortiz because there were over eighty purchases from January through December 2015 that had not been allocated because Ortiz had not yet submitted a receipt and/or the requisite Maintenance Debit Card Report.

13. From January through April 2016, despite numerous calls and emails from various finance department employees, including the Controller, Ortiz still failed to submit receipts and his Maintenance Debit Card Reports on a timely basis.

14. A lack of trust in Ortiz led to Maison Kayser cancelling Ortiz's credit/debit card and removing it from his possession in April 2016.

15. Maison Kayser continued to investigate Ortiz's purchases, but it had difficulty getting any additional information from Ortiz about them.

16. The very next month, Ortiz gave two weeks' notice of his resignation.

17. On or about May 24, 2016, Maison Kayser discovered that Ortiz used his company email account to email an invoice from a company called "By Any Means" – upon information and belief, Ortiz's company.

18. The invoice, dated May 14, 2016, was addressed to a company called "New York Dental Health."

19. It was for $888.00 and detailed the following work: "Install new circuit breakers ran new bx cable cause the line was fried due to leak in the ceiling we changed outlets in the X-ray room and also ran new Bx wire for that room also the price of the labor the labor cost on this job was 550.00 and materials was 333.00 Leslie paid the company in cash and was getting reimbursed by boss."

20. Subsequent investigation led to discovery of at least the following purchases, made by Ortiz during his employment on the Company credit/debit card, that are unrelated to work done for Maison Kayser:

(a) 1/19/16 through 1/21/16, multiple purchases totaling $326.62 for "food for employees" (he was not permitted to purchase food for himself or others using the Company credit/debit card);

(b) 1/21/16, $221.95, for "spot light bulbs";

(c) 2/18/16, $543.29, for "drillstoles [sic] in cement";

(d) 3/2/16, $366.91, for "punch list supply 921";

(e) 3/14/16, $177.34, for "kitchen sinks"; and

(f) 3/15/16, $1,471.99, for "kitchen walls."

21. Upon information and belief, Ortiz made these and other purchases in order to buy tools and/or materials for his personal use or for use in his personal business, "By Any Means."

22. Ortiz generally went to the same group of hardware stores to purchase tools and supplies. One in particular, True Value Places, did not provide itemized receipts, so Maison Kayser cannot compare the receipt to the purchases listed on Ortiz's Maintenance Debit Card Reports.

23. Upon information and belief, Ortiz deliberately went to this store in order to hide additional fraudulent purchases, which Maison Kayser has yet to identify.

24. Upon information and belief, Ortiz deliberately used vague descriptions of his purchases on the Maintenance Debit Card Reports, such as "kitchen walls" and "punch list supply for 921" in order to hide fraudulent purchases.

25. Upon information and belief, once Ortiz realized that his purchases were being scrutinized further, he resigned his employment to avoid discovery of his theft.

26. Before he left, Ortiz told a coworker that he planned to open a company, and that he had purchased many of the tools for that company using the corporate Visa credit/debit card.

AS AND FOR A FIRST COUNTERCLAIM
BREACH OF CONTRACT

27. Maison Kayser repeats and realleges the allegations set forth in previous paragraphs, as if fully stated herein.

28. Ortiz entered into a contract with Maison Kayser wherein he agreed to use the Company credit/debit card for business purposes only.

29. Ortiz breached that contract by making personal charges in the amount of at least $3,108.10 to his Company Visa credit/debit card.

30. As a result of the aforesaid wrongful conduct of Ortiz, Maison Kayser has been injured, for which it is entitled to recover at least $3,108.10 plus pre- and post-judgment interest.

AS AND FOR A SECOND COUNTERCLAIM
UNJUST ENRICHMENT

31. Maison Kayser repeats and realleges the allegations set forth in previous paragraphs, as if fully stated herein.

32. Maison Kayser provided Ortiz with a Company Visa credit/debit card to use for business purposes only.

33. Ortiz, however, used the Visa debit/credit card for his personal benefit by making non-business related charges in the total amount of at least $3,108.10.

34. Maison Kayser relied on Ortiz's representations that these purchases related to its business when it paid Ortiz's corporate Visa credit/debit card off.

35. As a result of the aforesaid conduct, Ortiz has been unjustly enriched in the amount of at least $3,108.10 and Maison Kayser has been injured to its detriment, for which it is entitled to recover at least that amount plus pre- and post-judgment interest.

AS AND FOR A THIRD COUNTERCLAIM
CONVERSION

36. Maison Kayser repeats and realleges the allegations set forth in previous paragraphs, as if fully stated herein.

37. Ortiz intentionally and wrongfully converted and misappropriated Maison Kayser's money in the amount of at least $3,108.10 without authorization.

38. Ortiz was aware that he took Maison Kayser's money when he made personal charges on the corporate Visa credit/debit card.

39. Ortiz exercised and exercises dominion over the money to the exclusion of Maison Kayser even today.

40. Ortiz has failed and refused to return this money to Maison Kayser, despite his obligations under contract, as well as civil and criminal law.

41. Ortiz's conduct was intentional and evinces a high degree of moral turpitude and wanton dishonesty. In converting Maison Kayser's money for his personal use, Ortiz acted out of malice and in bad faith, and intended to injure Maison Kayser. Accordingly, an award of punitive damages is justified in an amount to be proven at trial.

42. As a result of the aforesaid intentional and wrongful conduct of Ortiz, Maison Kayser has been injured, for which it is entitled to recover the converted money as compensatory damages in the amount of at least $3,108.10 plus pre- and post-judgment interest, together with punitive damages in an amount as proof at trial may warrant.

AS AND FOR A FOURTH COUNTERCLAIM
BREACH OF DUTY OF LOYALTY/FIDUCIARY DUTY

43. Maison Kayser repeats and realleges the allegations set forth in previous paragraphs, as if fully stated herein.

44. Ortiz owed a duty of loyalty and/or fiduciary duty to Maison Kayser based on his relationship of trust and confidence as an employee of Maison Kayser.

45. Ortiz breached that duty knowingly and willfully by using the corporate Visa credit/debit card for his personal use without authorization.

46. Ortiz's breach was the proximate cause and cause in fact of Maison Kayser's loss of money in the amount of at least $3,108.10.

47. Ortiz's conduct was inconsistent with his agency of trust and his duty to act at all times with the utmost good faith and loyalty in the performance of his duties.

48. Ortiz's conduct was intentional and evinces a high degree of moral turpitude and wanton dishonesty. In breaching his duty, Ortiz acted out of malice and in bad faith, and intended to injure Maison Kayser. Accordingly, an award of punitive damages is justified in an amount to be proven at trial

49. As a result of the aforesaid conduct of Ortiz, Maison Kayser has been injured, for which it is entitled to recover at least $3,108.10 plus pre- and post-judgment interest, and attorneys' fees, together with punitive damages in an amount as proof at trial may warrant.

AS AND FOR A FIFTH COUNTERCLAIM
FRAUD

50. Maison Kayser repeats and realleges the allegations set forth in previous paragraphs, as if fully stated herein.

51. On the Maintenance Debit Card Reports, Ortiz falsely represented to Maison Kayser that each and every purchase he made on the corporate VISA credit/debit card was for business purposes only, so as to induce Maison Kayser to pay for his personal purchases and continue to allow him access to the corporate VISA credit/debit card.

52. Upon information and belief, Ortiz also intentionally omitted facts which, if known, would have resulted in Maison Kayser scrutinizing the Maintenance Debit Card Reports further and potentially discovering Ortiz's fraud.

53. Ortiz deliberately, fraudulently, and purposely made such misrepresentations and/or intentionally omitted facts, intending to deceive Maison Kayser and knowing that the use of the corporate VISA credit/debit card for personal purchases was not permitted.

54. In doing so, Ortiz acted out of malice and in bad faith, and intended to injure Maison Kayser. Accordingly, an award of punitive damages is justified in an amount to be proven at trial.

55. Maison Kayser justifiably relied on Ortiz's misrepresentations and, based on the misrepresentations and material omissions, paid for the personal purchases and continued to allow him access to the corporate VISA credit/debit card so that Ortiz could make further personal purchases.

56. As a direct and proximate cause of Ortiz's fraud and misrepresentations, Maison Kayser has been injured, for which it is entitled to recover at least $3,108.10 plus pre- and post-

judgment interest, and attorneys' fees, together with punitive damages in an amount as proof at trial may warrant.

AS AND FOR A SIXTH COUNTERCLAIM
BREACH OF THE FAITHLESS SERVANT DOCTRINE

57. Maison Kayser repeats and realleges the allegations set forth in previous paragraphs, as if fully stated herein.

58. Maison Kayser provided Ortiz with a Company Visa credit/debit card to use for business purposes only.

59. Ortiz, however, used the Visa debit/credit card for his personal benefit by making non-business related charges in the total amount of at least $3,108.10 without authorization, and as such, Ortiz engaged in disloyal activities related to the performance of his duties.

60. Ortiz's disloyal activities materially and substantially permeated his service to Maison Kayser.

61. Pursuant to the faithless service doctrine, Ortiz is obligated to disgorge to Maison Kayser all compensation that it provided to him during his period of disloyalty.

WHEREFORE, Defendant/Counterclaim-Plaintiff Maison Kayser respectfully requests that judgment be entered on its Counterclaims as follows:

(a) On the FIRST COUNTERCLAIM awarding Defendant/Counterclaim-Plaintiff at least $3,108.10 plus pre- and post-judgment interest;

(b) On the SECOND COUNTERCLAIM awarding Defendant/Counterclaim-Plaintiff at least $3,108.10 plus pre- and post-judgment interest;

(c) On the THIRD COUNTERCLAIM awarding Defendant/Counterclaim-Plaintiff at least $3,108.10 plus pre- and post-judgment interest, together with punitive damages in an amount as proof at trial may warrant;

(d) On the FOURTH COUNTERCLAIM awarding Defendant/Counterclaim-Plaintiff at least $3,108.10 plus pre- and post-judgment interest, together with punitive damages in an amount as proof at trial may warrant;

(e) On the FIFTH COUNTERCLAIM Defendant/Counterclaim-Plaintiff at least $3,108.10 plus pre- and post-judgment interest, together with punitive damages in an amount as proof at trial may warrant;

(f) On the SIXTH COUNTERCLAIM awarding Defendant/Counterclaim-Plaintiff the disgorgement of the total wages paid to Plaintiff/Counterclaim-Defendant during his period of disloyalty, in an amount as proof at trial may warrant;

(g) Dismissal of Plaintiff/Counterclaim-Defendant's Complaint in its entirety, with prejudice; and

(h) Awarding Defendant/Counterclaim-Plaintiff its costs of suit, reasonable attorneys' fees, and such other and further relief as the Court deems just, proper or equitable.

Date: December 23, 2016
New York, New York

s/ Christine Hogan

Christine L Hogan

LITTLER MENDELSON
A Professional Corporation
900 Third Avenue
New York, NY 10022.3298
212.583.9600
clhogan@littler.com

Attorneys for Defendant